

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 22-CR-20552-MD

UNITED STATES OF AMERICA,) VOLUME I OF I
) PAGES: 1 - 44
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)
VS.) DATE OF PROCEEDINGS:
) OCTOBER 11, 2024
)
) COURTROOM NUMBER 12-4
DAVID RIVERA,) WILKIE D. FERGUSON, JR.
ESTHER NUHFER,) UNITED STATES
DEFENDANTS.) COURTHOUSE

TRANSCRIPT OF STATUS CONFERENCE PROCEEDINGS
BEFORE THE HONORABLE MELISSA DAMIAN,
UNITED STATES DISTRICT JUDGE, AT
400 NORTH MIAMI AVENUE,
MIAMI, FLORIDA 33128.

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1 (Proceedings commencing at 1:36 p.m.)

2 **THE COURT:** All right. Okay. So let's go ahead.

3 All right. Calling case number 22, criminal, 20552,
4 *Damian, United States of America versus David Rivera and Ester*
5 *Nuhfer.*

6 Counsel, please state your appearances, starting with
7 the Government.

8 **AUSA SCHIMKAT:** Good afternoon, Your Honor. Harry
9 Schimkat and Dan Bernstein for the United States.

10 **THE COURT:** Good morning. And on behalf of Defendant
11 Rivera.

12 **ATTORNEY SHOHAT:** Good afternoon, Your Honor. Ed
13 Shohat and David Weinstein, Jones, Walker, LLP, on behalf of
14 Mr. Rivera, who's is in court with us.

15 **THE COURT:** Thank you and good afternoon. And on
16 behalf of Ms. Nuhfer?

17 **ATTORNEY MARKUS:** Good afternoon. David Markus, Margo
18 Moss and Melissa Madrigal on behalf of Esther Nuhfer, who's
19 present in court.

20 **THE COURT:** Good afternoon to all of you. Everybody
21 can be seated.

22 All right. So we set this, if you recall, just to sort
23 of stay on top of progress in all of our scheduling. I wanted
24 to first check in with counsel for Mr. Rivera to see how you
25 are doing, if there's any issues, because I know we had you

1 enter a permanent appearance but with permission to withdraw,
2 despite the local rule, if that became necessary. How is that
3 going?

4 **ATTORNEY SHOHAT:** Your Honor, first of all, I want to
5 thank you for indulging us in the issue that we've been dealing
6 with for quite some time and giving us the opportunity to
7 withdraw. But I can advise the Court now that we have no
8 intention of withdrawing from the case.

9 **THE COURT:** Okay. Great. And somebody had -- somebody
10 was trying to sell a house in New Smyrna Beach, which I think
11 got a little slammed. So hopefully that is okay. I that
12 that's what I was hearing on the news.

13 Okay. So thank you for letting us know that.

14 And then Mr. Schimkat or Mr. Bernstein, how are we
15 doing on discovery?

16 **AUSA SCHIMKAT:** It has been moving along, Your Honor.
17 At the arraignment, we had turned over discovery to the
18 defendants, approximately 40 gigabytes of information that
19 contained what we thought was the main portion of the
20 government's discovery in the case, literally thousands of
21 e-mails and text messages that we had identified as the key
22 evidence in the case, as well as a large number of financial
23 and other business records all pertinent to this matter.

24 Since then, we have primarily focussed on getting
25 copies to the defendants of a rather large amount of electronic

1 evidence that had been gathered during the course of the
2 investigation, consisting largely of search warrants for
3 various e-mail accounts of both Mr. Rivera and various third
4 parties.

5 In gathering that evidence during the course of the
6 investigation, that evidence had gone through a filter review
7 process, to segregate out any potentially privileged
8 information that had been picked up in those search warrants to
9 the e-mail providers as well as from Mr. Rivera's iPhone.

10 So in the production, what we have done is that
11 information was all loaded into a litigation support service
12 into a Relativity database to make it more searchable. We have
13 had exports of that data from our Relativity provider exported
14 to our office so that we could provide it to the defendants on
15 hard drives so that they can also review it electronically
16 after loading it into a database such as Relativity. And
17 that's been a two-part process.

18 So what we have done is, first, we had to get exports
19 of these various search warrants for the information that's
20 been available to the case team, in other words, to myself and
21 Mr. Bernstein and the agents. I have received from the
22 defendants today, and I'm expecting to get a hard drive shortly
23 from Mr. Markus early next week. We will now load that
24 material on to the hard drives and then provide it to the
25 defendants so that they can undertake their own review. That

1 will consist of the documents and the materials that we had
2 already turned over back on August 30th that we had identified
3 as relevant to the case as well as all the other e-mails and
4 other items picked up in those search warrants so that they can
5 undertake a review for material that they believe might be
6 exculpatory to the defense.

7 So we're basically giving them everything available to
8 us from those various search warrants so they can see what we
9 have designated as relevant as well as have access to all the
10 other things in those e-mails accounts in order that they can
11 take their own review for what they think might be exculpatory.
12 I mean, obviously, at this point, they have not told us what
13 their defense is. It's sort of impractical for us to do a
14 review for exculpatory information flying in the blind. I may
15 have some idea what Mr. Rivera's defense is. But in an
16 abundance of caution, we're basically giving them the entirety
17 of those e-mail accounts so that they can look for it
18 themselves. That production, which should be go out to the
19 defendants next week, will be about 200 gigabytes of additional
20 material. Again, they can load it into Relativity or another
21 searchable database to undertake their review running search
22 terms and whatnot for any sort of exculpatory information they
23 may have.

24 In parallel to that, a filter attorney from our office
25 has also engaged in discovery with the defendants. I'm not as

1 involved in that for obvious reasons, but I know that the
2 filter attorney has reached out defense counsel. I believe he
3 has already provided defense counsel with material that had
4 been withheld from the case team that is potentially
5 privileged, and to ask the defendants to take a position on
6 whether or not those materials are in fact privileged or not.

7 I don't know the current status of that. I believe
8 that had been undertaken a little while ago. But I don't know
9 where it stands as far as, for instance, the defendants
10 preparing a privileged log as to which items they're going to
11 assert privilege to or whatnot. And I believe there might be
12 additional materials coming. But again, I'm not looped into
13 the day to day of those discussions between the filter attorney
14 and defense counsel. But that, again, would be a production
15 just on the filter side of the materials from those various
16 search warrants I've mentioned.

17 That has been a large task for the Government to
18 undertake, but I think we're in a position now where that will
19 largely be complete next week. There is some additional
20 discovery I still need to get out to them. And directly from
21 the case side of the team, that's going to be a relatively
22 small amount discovery -- of discovery compared to what we've
23 already produced.

24 And now that my portion of that e-litigation-type
25 discovery is done, I can turn to that and get that done

1 hopefully within the next week or two. And that will largely
2 be the discovery that is being turned over from the case --
3 from the case team side of things.

4 **THE COURT:** Okay. So in a nutshell, the massive
5 majority should all be to them in the next couple weeks.

6 **AUSA SCHIMKAT:** Correct.

7 **THE COURT:** And the privilege filter is on going. And
8 you just have a little bit more that will also flow after that.

9 **AUSA SCHIMKAT:** Correct, Your Honor.

10 **THE COURT:** And they know where those other things are
11 coming from --

12 **AUSA SCHIMKAT:** Yes, correct.

13 **THE COURT:** -- that's still missing?

14 All right. Okay. So let me hear from the defense
15 about discovery from your perspective.

16 **ATTORNEY SHOHAT:** May I approach the podium, Judge?

17 **THE COURT:** Sure.

18 **ATTORNEY SHOHAT:** Thank you, Your Honor.

19 As you can hear, there isn't a very large of amount of
20 discovery, 240 gigs for starters. Thousands and thousands of
21 e-mails and text messages. The process of reviewing those
22 individually is an extraordinarily lengthily and time-consuming
23 process. But Your Honor set the hearing to address scheduling
24 issues. And that's what I want to do.

25 We are getting up to speed as fast as we can on the

1 case, but we've already realized that this is a very
2 complicated case and there are some issues that we want to put
3 on the table today that we think will, in all likelihood,
4 impact scheduling of this case going forward, not -- well
5 beyond the extensive project of reviewing thousands and
6 thousands gigs of discovery, 240 gigs for starters.

7 We want to alert the Court to issues. The first, and
8 the one we think may implicate the schedule of the case the
9 most is what we see as foreseeable issues under the Classified
10 Information Procedures Act.

11 On September 9th, we sent an e-mail to the government,
12 which we characterized correctly as a *Brady* demand for
13 extensive information that we think, and we pointed this out in
14 our e-mail, will implicate the Classified Information
15 Procedures Act. We have not, to date, received a response to
16 that September 9th *Brady* demand. We're expecting a response.
17 Mr. Schimkat has indicated that it's forthcoming.

18 Essentially, what we have requested, our initial
19 request was limited to CIPA material related to the April 2018
20 meeting between Congressman, U.S. Congressman Pete Sessions and
21 Venezuelan President Nicolas Maduro, which is set out in overt
22 acts 82 through 88 of Count 1 of the indictment.

23 We will soon be expanding that request, however, to
24 include allegations in the superseding indictment about
25 Congressman Sessions meeting in New York, meetings in New York

1 in April of 2017 described in overt acts 10 through 19 of the
2 indictment, as well as his involvement in the ExxonMobil events
3 described in overt acts 20 through 47 of the indictment.

4 We also anticipate expanding our *Brady* request to the
5 conduct of Senator Marco Rubio, described in overt acts 34
6 through 65 of the indictment, and possibly other aspects of the
7 superseding indictment as well, which we're still studying.

8 Judge, in a nutshell, each one of these activities
9 implicate the existence of state department and other possible
10 government agency classified correspondence, tables and
11 documents describing these events and whether they were
12 conducted by the respective U.S. officials for the purpose of
13 promoting and supporting the Government of Venezuela, which is
14 the purpose they have ascribed to both Defendants Rivera and
15 Nuhfer in this case.

16 Just as an example, Judge, it's inconceivable that a
17 U.S. Congressman, Congressman Pete Sessions of Texas, as
18 alleged in the indictment, on invitation, travelled to meet
19 with the president of Venezuela, Nicolas Maduro, as alleged in
20 the indictment, met with him along with Mr. Rivera, then met
21 the next day with the embassy and CIA officials, as alleged in
22 the indictment, without there being substantial cable and other
23 documents, which are classified, describing and justifying
24 those events and what their purpose was.

25 It is inconceivable, just off the top line, that a U.S.

1 Congressman did these things in order to promote the government
2 of Venezuela, which is what they've accused Mr. Rivera and
3 Ms. Nuhfer of engaging in these events for.

4 CIPA, Judge, is a very complicated and time-consuming
5 process. We were entitled to see how the U.S. Government
6 describe these activities to itself. And to the participants
7 who were U.S. Government officials. Obtaining security
8 clearances for the lawyers will be necessary. Clearly defining
9 the scope of the discovery requests, which often involves
10 multiple hearings, reviewing the documents once they were
11 disclosed, and then having the necessary litigation to
12 determine the process for utilizing any relevant materials at
13 trial. These are very time-consuming processes. We believe
14 the issues of CIPA must be built into our schedule.

15 As I said, I know the government's doing the best they
16 can. They've been working on discovery very diligently and
17 we're happy with the discovery process as it's going forward.
18 We have no complaints about that. But it's -- so far, it's
19 been over a month and we've had no response. We think the
20 Court needs to be aware that there are -- appear to be several
21 significant CIPA issues that are going to present themselves in
22 this case.

23 In addition, we see, and we're just getting started
24 here, Judge, the necessity for litigation over Rule 17C
25 subpoenas. We don't know what position the government's going

1 to take, but we do see the issuance of Rule 17C subpoenas as on
2 the horizon in this case. Congressman Sessions and Senator
3 Rubio and other current and former government officials may be
4 the subject of such subpoenas. State department and White
5 House officials during the Trump administration and ExxonMobil
6 officials could be the subject of these subpoenas. All of
7 these are portions of the indictment in this case. They are
8 alleged FARA conduct in this case.

9 We also, Judge, in addition to Rule 17C subpoenas, see
10 issues, possible issues, coming to the floor about Rule 15
11 depositions of witnesses in foreign countries. That's entirely
12 possible. Within the subpoenas issue, buried within them, as
13 we all know from experience, are code of federal regulation and
14 Touhy regulation issues for subpoenas decus tecum and witness
15 subpoenas for current and foreign government officials and
16 agents, which could be on the table.

17 Also, Judge, Mr. Schimkat laid out the extent of the
18 discovery. There's going to be a -- I see, foresee real time
19 issues as to the ability to review that discovery. He referred
20 to multiple search warrants. We have not received, to this
21 date, any search warrants or search warrant affidavits or the
22 inventories for the search warrants that need to be evaluated
23 for possible constitutional issues with respect to the search
24 warrants. So we're not even able yet to begin that process.
25 From our communications, both orally and in writing with

1 Mr. Schimkat, those things are forthcoming, but we haven't
2 received them yet.

3 In addition, Judge, the government's index, they've
4 given us an index of their initial tranche of discovery, the
5 200 gigabytes that they gave us at arraignment. And it's 131
6 pages of just the index, Judge, of that material. And when I
7 say "index," it really just describes very, very generally the
8 material and provides a bates number. It's not a particularly
9 revealing index. But having said that, part of the index
10 reveals that the government has received three of the four
11 depositions in -- from the lawsuit in the *PDV USA versus*
12 *Interamerican* lawsuit in the Southern District of New York,
13 including Mr. Rivera's deposition. I think I need to alert the
14 Court that there may be -- well be issues regarding the
15 government's involvement in that lawsuit as a strategy to get
16 around Mister, we believe, possibly, to get around some of
17 Mr. Rivera's constitutional rights in this case. We have made
18 a specific *Brady* demand in early September on this subject and
19 laid this out for the Government. It's not a mystery to them.

20 In fact, in two of our early *Brady* demands in September
21 are intended to get to the bottom of this issue. And again, we
22 have not received a response to any of our *Brady* demands.

23 So those are the issues that for me, on behalf of David
24 Rivera and for Mr. Weinstein, we can identify at this moment as
25 appearing to be issues that could impact scheduling in this

1 case. And of course none of this relays -- relates at all to
2 any dispositive motions that we may be filing. We're just in
3 the starting process of evaluating those, recognizing the
4 deadlines early next year. And we'll get to those separately.

5 There is one other issue, with the Court's permission,
6 I'd like to raise. And it's a bit unusual.

7 As the Court is aware, there is on-going litigation
8 involving the effort by a company by the name of PDV USA to
9 obtain the Cozen memorandum, what we believe is a highly
10 confidential lawyer's legal memorandum, from Ms. Nuhfer. The
11 issue has only been litigated to date in a collateral civil
12 proceeding before Your Honor, and it's still in the middle of
13 that litigation. And it has never been litigated in this case.
14 It's been litigated in the civil case but not in this case.

15 As we spelled out in our most recent filing in that
16 lawsuit, it appears, and there is hard evidence, that PDV USA's
17 lawsuit, while they may have their own motivations, it appears
18 in part at least, substantial part, to be a stalking horse for
19 the Government in this case, particularly to obtain the Cozen
20 memorandum by doing a complete end run, as we've openly
21 alleged, around Mr. Rivera by going -- trying to get it from
22 Ms. Nuhfer.

23 This appears to be even more so since the Government,
24 which had initiated sealed litigation in front of Judge Moore
25 to obtain the Cozen memorandum, has abandoned that effort. And

1 in fact, according to the affidavit of Richard Klugh, which was
2 filed as an exhibit to our papers in the civil litigation, they
3 even moved for Judge Moore to vacate his order that required
4 the turnover of that memorandum. And that order, as I
5 understand, has been vacated. And so the government's
6 abandoned that.

7 PDV USA filed that lawsuit and has admitted filing that
8 lawsuit after consult- -- only after consultation with the
9 prosecutor. So here's my ask today, Judge, and I'd like you to
10 think about this. And what we would like to make sure does not
11 happen, no matter what the outcome is of the PDV litigation for
12 getting the memorandum from Ester Nuhfer, the confidential
13 memorandum, that the government not be permitted to obtain that
14 memorandum from PDV USA, which is sure to turn it over
15 immediately, until we have an opportunity to raise any
16 constitutional or other issues in this litigation between us
17 and the Government; that they simply be directed that before
18 they do that, we be put on notice that they intend to do it or
19 they've asked for the memorandum, or whatever, and have an
20 opportunity to litigate what's right in this litigation between
21 us and the Government.

22 That's my ask for today. Thank you, Judge.

23 **THE COURT:** I have one question about that one, and
24 that one is -- involve separate lawyers. It's -- well, the
25 civil subpoena enforcement action is actually in front of me

1 and it does involve separate lawyers. But there's the grand
2 jury action that was in front of Judge Moore. I think that's
3 now Judge Altman, right?

4 **ATTORNEY SHOHAT:** I'm sorry. Would you repeat that,
5 Judge.

6 **THE COURT:** I don't think Judge Moore has that any
7 more, right? Isn't that Altman?

8 **ATTORNEY SHOHAT:** No. Altman -- Judge Moore has it.
9 It went from Judge Moore to Altman back to Judge Moore. That's
10 what happened.

11 **AUSA SCHIMKAT:** Your Honor, I can clarify that. I'm
12 obviously not handling that fitter litigation. That's been
13 handled by filter attorneys in our office. But I can tell the
14 Court that that litigation on the grand jury side of things is
15 done with. It's complete. It actually had gone up to the
16 Eleventh Circuit.

17 **THE COURT:** Right.

18 **AUSA SCHIMKAT:** The Government, for whatever reason,
19 the filter attorneys decided, withdrew that proceeding and they
20 also withdrew the grand jury proceedings in front of Judge
21 Moore. So my understanding is any litigation on the grand jury
22 side of that is done to be potentially revisited in the
23 criminal case.

24 **THE COURT:** Okay. So the -- by being done, so what
25 does that mean?

1 **AUSA SCHIMKAT:** My understanding, and again, I'm
2 working sort of second hand because the filter attorneys are
3 being careful not to tell me too much, but my understanding is
4 the government had submitted a request to withdraw that
5 litigation, which Judge Moore has granted, without any sort of
6 ruling on the merits.

7 **ATTORNEY SHOHAT:** That's right, Judge. And Mr. Klugh's
8 affidavit in this case, which is Exhibit D to our objections,
9 says that. He's right about that.

10 **THE COURT:** So -- and that litigation kind of mirrored
11 in some sense the civil subpoena enforcement litigation. So...

12 **ATTORNEY SHOHAT:** Right.

13 **AUSA SCHIMKAT:** It was different in one context. And
14 this, I do have personal knowledge of. The Cozen memorandum
15 being litigated in that proceeding was provided by Mr. Rivera
16 to Hugo Perera. And then the Government obtained it from
17 Mr. Perera, as opposed to the civil litigation, which relates
18 to the Cozen memo through Ms. Nuhfer, as I understand it.

19 **ATTORNEY SHOHAT:** That's correct.

20 **THE COURT:** Right. So then I go back to if the
21 government has abandoned or withdrawn or whatever, ended the
22 grand jury proceedings, where does the memo end up in the
23 government case? What does that mean? Does that mean that the
24 government is no longer saying they have a right to it in the
25 grand jury proceedings?

1 **AUSA SCHIMKAT:** The Cozen memo remains in the filter
2 attorney's possession on the Government side.

3 **THE COURT:** Okay.

4 **AUSA SCHIMKAT:** But it has not been, at this point,
5 shared with myself and Mr. Bernstein. And there are
6 discussions as to whether it to renew and proceed forward in
7 this criminal case with respect to the memo that the government
8 filter attorneys have.

9 **THE COURT:** Okay. I've caught up.

10 **ATTORNEY SHOHAT:** That's exactly the point. I asked --
11 yesterday, Judge, I asked Mr. Schimkat directly whether they
12 had obtained the Cozen memo from some other source. He said
13 no.

14 **THE COURT:** Okay.

15 **ATTORNEY SHOHAT:** And that's what I'm saying is that
16 the issue of whether the prosecution team in this case should
17 have access to the Cozen memo should be litigated in this case,
18 not have it handed to them by PDV USA if Your Honor rules that
19 PDV USA gets it. That's the window of problematic situation
20 for us.

21 **THE COURT:** Okay. I get it. I get it. I'm caught up.

22 **AUSA SCHIMKAT:** And then, Your Honor, just with respect
23 to that, as I understand, and we've turned over in the
24 discovery, we've already provided to the defendants the
25 materials we have obtained from PDV USA. Like the deposition

1 testimony that they mentioned, that's -- we've already shared
2 it what we've got with defense counsel. So I know they've made
3 a *Brady* request, but they've already got it in their discovery.

4 As I understand the way the civil proceedings are
5 working, sort of protective order-type stuff, that that stuff
6 was available to be turned over to us because Interamerican
7 Consultant, Mr. Rivera's company, had not asserted in the civil
8 case confidentiality to those specific materials. So they were
9 able to share those materials with us. And then I guess it was
10 never litigated in the civil case.

11 **THE COURT:** Did you obtain that by way of a subpoena or
12 did you just ask for it and you got it? I think that's --

13 **AUSA SCHIMKAT:** Well, it was, as I recall, and I'm
14 speaking off the top of my head, but as I recall, we got a
15 limited amount of material from Citgo that was produced through
16 this civil proceedings. So yes, we did have conversations with
17 them from time to time, not nearly as extensive as the defense
18 thinks. But as I understand it, I believe that PDV -- we asked
19 for it. But previously, PDV USA, as I understand it, had been
20 served with a grand jury subpoena through DOJ-FCPA in
21 Washington because they were interested in any number of things
22 related to Citgo Petroleum. I believe in the subpoena that
23 DOJ-FCPA issued, there might have been a request for materials
24 related to this Interamerican Consulting contract. So on the
25 investigation side for the Rivera matter, we did not issue a

1 separate subpoena for it. We requested it. And if I recall
2 correctly, and again, this is off the top of my head, I think
3 the response was, Well, we've already got a subpoena from DOJ,
4 so we can give it to you," something along those lines.

5 **THE COURT:** Okay. So hold on one second.

6 (Off the record.)

7 **THE COURT:** Okay. So with respect to the issues raised
8 by Mr. Shohat, and I pretty much think they can be summed up as
9 potential CIPA issues, the -- which is capital 'C', capital
10 'I', capital 'P', capital 'A', the potential CIPA, the
11 potential for Rule 17C subpoenas that will come up, the
12 potential for Rule 15 depositions in foreign countries, I guess
13 also wrapped up with those subpoenas, will be two issues. The
14 question of whether or how many search warrant were executed
15 and how many search warrants, Mister, I mean -- how many search
16 warrants were issued?

17 **AUSA SCHIMKAT:** Roughly five or six.

18 **THE COURT:** And they probably all have almost the same
19 affidavit in support. That's usual.

20 **AUSA SCHIMKAT:** Slightly differences. I mean, some of
21 them are for third parties. But obviously, I'll turn over the
22 search warrants relating to Mr. Rivera's e-mail accounts. We
23 also searched his iPhone pursuant to sort of border search
24 authority/follow-up subpoena, I'm sorry, follow up search
25 warrants, and then we have some third party, I think two or

1 three third party search warrants also.

2 **THE COURT:** Okay. So on the --

3 **AUSA SCHIMKAT:** And those would be part of the next
4 production I'm anticipating in the next week or two is copies
5 of the search warrants.

6 **THE COURT:** Okay. So these are all things that
7 Mr. Shohat is bringing to the Court's attention because they
8 may cause delays.

9 So I'm going to say with respect to all of those
10 things, which I'm going to put in sort of a discovery bucket,
11 we're going to have to cross that bridge when we get to it. If
12 there's an issue, you need to put it in writing. I'm not here
13 prepared to -- you don't know how many CIPA issues, Rule 17
14 subpoenas, things like that. So as issues come up related to
15 discovery, I would put them in a motion if it's warranted. And
16 I'm not ignoring Ms. Nuhfer's counsel. I just want to --
17 really my point being, I'm not going to address or deal with
18 those now, obviously, because they're just sort of on the
19 horizon potential issues. But I appreciate you bringing them
20 to my attention.

21 Same thing with respect to allegations of -- or
22 potential allegations concerning the government's involvement
23 in the civil case. You know, if you're going to file a motion
24 based on those allegations, you're going to, you know, you're
25 going to have some meat to that. So, again, that's going to

1 have to be something that's going to have to be briefed.

2 With respect to the Cozen memo, we are up to speed on
3 the civil side of that. We have a bunch of things going on in
4 that case. But that is actually -- currently, I am up to speed
5 on that. So we'll deal with that first in the civil case. In
6 the meantime, I agree, if I find that it is privileged and
7 should not be disclosed in the civil case, I don't know why it
8 would be any different in the criminal case. But the
9 government may disagree and it will have to be taken up. But
10 at this point, I do appreciate the representation from the
11 government that for now, they're not -- its being treated as
12 privileged and it should remain that way.

13 So let's separately deal with the memorandum issue in
14 the civil case as it's already teed up. And the government is
15 on notice that they should not be making their own call on that
16 one in the criminal case. They may want to wait and see what
17 happens in the civil case, and that will be soon.

18 So I guess the nutshell being all of those issues, I
19 appreciate they've been brought to my attention, but there's
20 not really anything I can do about any of them now. So we're
21 just going to have to cross those bridges when we get to them.

22 I'm keeping the current scheduling order in place
23 because I don't have any hard information now that tells me
24 that it should be modified. And frankly, I want it there to
25 keep everybody on those deadlines for filing motions and

1 bringing things to the Court's attention. And if anything has
2 to be changed, well, that's something we'll deal with at that
3 point.

4 So for now, the scheduling order remains in place and
5 the government's just going to have to keep up with following
6 their obligations to continue to turn over discovery and keep a
7 filter team in place.

8 Yes.

9 **AUSA SCHIMKAT:** Yes. That's perfectly fair, Your
10 Honor. So thank you.

11 **THE COURT:** Go ahead. Go ahead.

12 **AUSA SCHIMKAT:** The one thing I would ask is just for a
13 speedy trial finding. I don't think it was included in the
14 Court's prior order, just finding that the time is excluded
15 between -- I guess the arraignment was on August 30th, and
16 trial, which is currently set for April 21st.

17 **THE COURT:** Oh, if I did not do that, then that was an
18 oversight on my part. But it was -- the delay was attributable
19 to the defendant's requesting the time. So do defendant's have
20 any objection to the exclusion through April 25th to this
21 point?

22 **ATTORNEY SHOHAT:** Mr. Rivera does not.

23 **AUSA SCHIMKAT:** No, Your Honor. He went through this
24 at the arraignment earlier.

25 **THE COURT:** Okay. So it's clear though, that is

1 excludable time from the date of the arraignment through the
2 current trial setting, which is April 25th of 2025.

3 And the only other thing that I will ask you,
4 Mr. Schimkat: Does -- is CIPA going to be something that we
5 need to alert the powers that be here about?

6 **AUSA SCHIMKAT:** I'm not sure. This is actually my
7 first experience now with a potential CIPA request. So I'll
8 have to check on that. I mean, on the government's side,
9 obviously, we're partnered up with the national security
10 division at DOJ. So they're looped in that there might be
11 potential CIPA litigation in this case. I honestly think that
12 it's not going to turn out the way Mr. Shohat expects it will.
13 A lot of the information relating to those specific events that
14 they're interested in, we've already turned over a lot of
15 discovery in that to them.

16 Now, it's not necessarily from the government agencies
17 that they're interested in, but I think as they have an
18 opportunity to review the discovery, they may come around to
19 the belief that there is probably a lot less on the agency side
20 of things than they think.

21 So, for instance, we have turned over a production of
22 documents that we have received from Congressman Sessions. We
23 plan on making Congressman Sessions interview report available
24 for their review shortly so they can see what Congressman
25 Sessions himself had to say. Whether they believe, after

1 reviewing that material, that it's worth to go through CIPA
2 litigation, I guess we'll see. But there's not going to be as
3 much there as they think, Your Honor.

4 **THE COURT:** Okay. So Mr. Schimkat, I need you to
5 communicate with the national security division, who is
6 probably -- who are probably the people who have undertaken a
7 review of the any classified communications. It's okay if you
8 haven't done it yet. But now, you're going to talk to them
9 because if -- they're the ones that would have reviewed any
10 classified communications and any classified documents; and
11 they're the ones who are going to know if there's anything that
12 fall within the government's discovery obligations that
13 happened to be classified because then the issue will be: Do
14 they want to declassify anything that does fall within the
15 government's discovery obligations, including Brady. And if
16 they don't, then you have to let the defense know that are --
17 that there's classified information in them.

18 **AUSA SCHIMKAT:** Sure. And I think our position on this
19 is going to be that the agencies that they've requested
20 information from, we did get information from one of those
21 agencies. It's a minimum amount of material that we are
22 reviewing to decide what we need to produce. Not classified
23 material, just material that we receive from that specific
24 agency, and that the other agencies that are specifically named
25 in their *Brady* request, I think we're going to end up

1 potentially litigating that because we don't believe those
2 agencies, some of which we did not have contact with, would be
3 part of the prosecution team for purposes of discovery. That
4 would be a preliminary step in -- before we have to undertake
5 any sort of CIPA review.

6 So we have already discussed that with our partners and
7 national security. We're sort of waiting to see how the fining
8 production with the state department pans out, which I hope to
9 have to them in the next week or two. And then it may be have
10 to be brought up more formally with that type of litigation,
11 Your Honor.

12 **THE COURT:** Okay. You'll just notify the Court. Okay.
13 One moment.

14 (Off the record.)

15 **THE COURT:** All right. So you -- so then to be clear,
16 the government is aware that you need to alert us, the Court
17 and the defense, or keep everybody updated as national security
18 undertakes a review to make sure there's nothing that falls
19 within the government's obligations, under the discovery rules
20 and *Brady*, et cetera, that is going to present an issue under
21 the Classified Information Protection Act.

22 Let me hear from -- poor Mr. Marcus who has been
23 sitting there so quietly.

24 **ATTORNEY MARKUS:** I'm practicing for the trial, Your
25 Honor. Let these guys battle it out.

1 So a couple things, Your Honor, just to underscore what
2 Mr. Shohat says and to give some context. Remember, this case
3 was indicted two years ago. So although, you know, I agree
4 with Mr. Shohat. We appreciate some of the efforts that the
5 government is making now. It is kind of nuts that we don't
6 have everything already. This case -- we were in front of Your
7 Honor back in August for the arraignment and pushed to arraign
8 the defendants, which I understand, but it's now been a long
9 time. And so we're waiting on some of the most important
10 discovery. I understand it's coming.

11 One of the complaints that we do have about the
12 discovery is this idea of the 302s. We haven't seen the
13 interview reports yet. And we've been trying to work out with
14 the government how to get them. And so we're still in the
15 process of trying to work that out. I just want to alert the
16 Court, this is going to be in large part a three- to four-week
17 witness case, and we haven't seen the reports yet. We suspect
18 there's lots of *Brady* material in those reports. So we'll
19 continue to work with the government on how to get those.

20 I think part of the problem is if you remember back in
21 August when we were before the Court, we -- this issue about
22 the protective order came up and about the defense not being
23 able to give it to third parties, and we raised the issue about
24 the government not being able to give discovery to third
25 parties as well. The Court agreed with us, asked us to work

1 with the government on getting a protective order in place.

2 That very same day, we e-mailed a draft to the government on
3 August 29th. We've been asked -- asking the government to get
4 back to us to agree on this, per the Court's order.

5 **THE COURT:** Have I not entered the protective order
6 yet?

7 **ATTORNEY MARKUS:** No. Remember what happened was they
8 submitted a protective order that you signed, and then we said,
9 well, hold on, it didn't include our objections. And so you
10 said on August 29th, "Give the government some language to
11 amend the protective order and get their approval on it," which
12 we did that very same day on August 29th. And we've been on
13 them to bet get back to us. "Do you have any problem with this
14 language or not?" And they have -- they keep telling us
15 they're going to get back to us on it and they haven't.

16 And so the original protective order, which the Court
17 said should be amended, is still in place and we're waiting on
18 the government to get back to us on this language.

19 The reason it's important, Your Honor, is because we
20 have this understanding that PDV USA and the government are
21 exchanging information. And so we don't want the government to
22 be able to disclose discovery and we want them to feel
23 comfortable showing us, for example, the 302s, without fear
24 that PDV USA is going to say, "Hey, hey, give us the 302s that
25 you just gave to the government." If the protective order's in

1 place, we can tell them, "Hey, you can't give it to PDV USA.
2 The judge said there's a protective order on the criminal
3 discovery."

4 So we don't really understand why the government's
5 dragging its feet on this protective order issue other than it
6 likes its cozy relationship with PDV USA.

7 **THE COURT:** Okay. Well, I recall that I did say it on
8 the record that there's a reciprocal obligation here or
9 reciprocal coverage by the protective order although you are
10 reminding me that I didn't actually ever sign a modified
11 language. But...

12 **AUSA SCHIMKAT:** My recollection, Your Honor, was that
13 -- cause I had said -- our position was the same: That to the
14 extent that we produce discovery to them, that should not
15 somehow *de facto* limit our ability to use the information
16 lawfully that we gather during the investigation.

17 And let me correct something that Mr. Marcus just said:
18 We have not been going to PDV USA and saying, "Here's a bunch
19 of stuff we gathered in the criminal case. Go at it." All
20 right. We got subpoenaed to provide information after
21 Mr. Rivera did everything he could to not comply with the
22 subpoena that he had to produce the information in the civil
23 lawsuit that he was obligated to produce. That was litigated
24 and Judge Louis, herself, ordered him to produce portions of
25 the government's discovery as being obligated to as a party to

1 the civil case.

2 It was only after Mr. Rivera's refusal to produce
3 documents he was ultimately ordered to produce that the
4 government got served with a subpoena from PDV USA.

5 I can tell you that they had asked us to turn stuff
6 over before that, specifically items that were referenced in
7 the indictment that anybody who read the indictment knew those
8 e-mails and text messages existed. And we said "We can't help
9 you." And then they said, "We're going to have to subpoena
10 you." And we said, "Subpoena us. And then we'll take a look
11 at it and we'll decide what we do."

12 So we got a subpoena. We then told defense counsel
13 about it, who objected to our compliance with the subpoena. So
14 we said "Okay." We then had to file, I think it was a 20-page
15 brief with the Court seeking permission from the Court as to
16 why we felt bound to produce documents pursuant to what
17 appeared to be a lawfully issued subpoena.

18 I will note: Interamerican Consulting, the party in
19 the New York civil litigation, did not object to our compliance
20 with that subpoena. It was only the defendants on an
21 individual basis that initially said they objected to our
22 compliance with the subpoena after we told them we're going to
23 comply, what's your position?

24 We filed a 20-page application briefing the issue as to
25 why we did not believe grand jury secrecy applied, why the

1 protective order did not cover it, and we cited case law for
2 precedent that this material somehow were not protected from
3 the reach of a subpoena. After we did that, they didn't even
4 file a response.

5 **THE COURT:** Okay. Wait. What case is that in?

6 **AUSA SCHIMKAT:** Which case?

7 **THE COURT:** Where is that briefing?

8 **AUSA SCHIMKAT:** That was, I think, it was filed in this
9 -- in this criminal case, I just don't remember if it was
10 before or after it got transferred from Judge Gayles to you,
11 but it was referred to Judge Torres, the application that the
12 government filed.

13 The subpoena issue with Mr. Rivera was in the civil
14 subpoena enforcement action filed against by -- filed against
15 Mr. Rivera by PDV USA.

16 **THE COURT:** In what court?

17 **AUSA SCHIMKAT:** Southern District of Florida.

18 **THE COURT:** But that's not before me.

19 **AUSA SCHIMKAT:** I think it is, Your Honor.

20 **THE COURT:** But there's not a, like an objection to an
21 R and R on that particular issue.

22 **ATTORNEY MARCUS:** No, Your Honor.

23 **AUSA SCHIMKAT:** No. No. So Judge Louis -- it was an
24 order, and I don't believe it was objected to or appealed from
25 Judge Louis' order. So it was Judge Torres' order in this

1 criminal case saying government comply with this subpoena. And
2 it was Judge Louis in the subpoena enforcement action, the
3 civil case, with respect to Mr. Rivera's production.

4 So -- and I'm just saying this because this assertion
5 that we're somehow voluntarily turning things over.

6 **THE COURT:** Okay. I understand. But -- and I -- now I
7 am -- my recollection is refreshed.

8 So we had a discussion regarding the defense's desire
9 to have sort of reciprocal obligations under the protective
10 order. I agreed to that. But I do recall that in all --
11 having the conversation continue that whenever we have a
12 protective order like this, there is an exception when somebody
13 has to comply with legal obligations. So that would be if
14 they're subpoenaed, the normal course of action is somebody
15 comes in and objects to their compliance with the subpoena.
16 That gets litigated.

17 **ATTORNEY MARKUS:** Right.

18 **AUSA SCHIMKAT:** That is totally -- and I'm fine with
19 that.

20 **THE COURT:** And that's fine. But that doesn't get you
21 out of if you're not subpoenaed. What they want is when you're
22 not subpoenaed for you not just to be handing out discovery is
23 really what they're saying.

24 So why can't we get that amendment to the
25 confidentiality order in place to at least patch that little

1 hole.

2 **ATTORNEY MARKUS:** This was already ordered, Your Honor.
3 I'm not sure why we're --

4 **THE COURT:** So we don't have the language yet.

5 **ATTORNEY MARKUS:** But we gave it to them on
6 August 29th. I'm glad I was able to get Mr. Schimkat all fired
7 up on a Friday afternoon, but we've been waiting for over a
8 month now to get the language back. The only issue is: What's
9 the delay in getting this language back from the government on
10 an issue that the Court already ruled on?

11 **THE COURT:** Okay. So have you had a chance to look at
12 the language?

13 **AUSA SCHIMKAT:** I looked at the language. First of
14 all, I don't remember a definitive ruling from the Court. I
15 remember -- I suggested briefing, and the Court said, if I
16 recall, "This sounds like something that could be worked out
17 between the parties."

18 **ATTORNEY MARKUS:** No.

19 **AUSA SCHIMKAT:** Mr. Marcus did send over the e-mail
20 right away.

21 **THE COURT:** Okay.

22 **AUSA SCHIMKAT:** The language he included we did not
23 think worked, in part because things sometimes happen and may
24 be there's a reason the government would have to disclose
25 something to a third party, right? Things -- unforeseen things

1 happen.

2 **THE COURT:** Okay. Well, then take the language. Now
3 I'm telling you now. Go back. Take a look at the language. I
4 mean, usually that's covered in these orders with language that
5 says you're -- that doesn't prohibit you with complying with
6 your legal obligations. If you think that language needs to be
7 modified, modify it and get it back to them because that is --
8 that's let's just have this hole patched. You should be under
9 a reciprocal obligation to maintain the confidentiality of
10 things that are being exchanged in discovery except, you are of
11 course, as are the defendants, you know, not prohibited from
12 complying with legal obligations, like court orders and
13 subpoenas.

14 If something comes up and you need clarification like
15 that possible other issue that might come up where you need to
16 give documents to a third party, you bring it to the attention
17 of the defense that, you know, there's instructions in the
18 confidentiality order of that procedure.

19 But I guess there's a lot on your plate just with this
20 case alone. But let's focus on getting that matter patched up.
21 Look at their language. Send them back a response to that
22 proposed language and let's get that one dealt with.

23 I completely understand that there's all sorts of
24 hypothetical possibilities that may come up. If those come up,
25 again, be another bridge for us to cross when we do, but

1 there's no reason we can't be modifying this is to make it
2 clear. And it actually protects you in some ways, that you're
3 not -- you know, when the parties in this civil litigation are
4 asking you for things, you can say, "Sorry. We're bound by a
5 confidentiality order. And, you know, if you want it, you're
6 going to have to subpoena it."

7 So get them a response to that language --

8 **AUSA SCHIMKAT:** Your Honor, I will try to. I didn't
9 mean to get too excited about it. But the idea --

10 **THE COURT:** He said he got you excited on a Friday
11 afternoon.

12 **AUSA SCHIMKAT:** Wake everybody up.

13 I will try to work with him on it. Obviously, I've
14 been trying to get them a lot of stuff in the meantime.

15 **THE COURT:** I know.

16 **AUSA SCHIMKAT:** It seemed pretty far apart when I got
17 his e-mail. It was sort of like 'let me focus on the more
18 important stuff for now.' But I will take it back up with
19 Mr. Markus.

20 **THE COURT:** All right. You got a lot to do. I
21 understand it. But let's get it done. Let's get the discovery
22 over to them.

23 And I, you know, I'm not going to rule on the other
24 things that were brought to my attention but I appreciate that
25 they were. At a point, we're still on trial scheduled -- I

1 mean, we're still under the same scheduling order that was
2 issued before that -- the order setting trial, which is Docket
3 Entry Number 218, is still in place although the actual trial
4 date was modified in Docket Entry Number 222. But the schedule
5 that is set forth in 218 is in place. It's not being modified
6 at this point. You got a lot of work to do.

7 Is there anything else I need to hare?

8 **ATTORNEY SHOHAT:** No, Your Honor.

9 **THE COURT:** All right. Thank you very much.

10 **AUSA SCHIMKAT:** Thank you.

11 (Proceedings concluded at 2:31 p.m.)
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C E R T I F I C A T E

I certify that the foregoing pages represent a true and correct transcript of the official electronic sound recording as provided to me by the U.S. District Court, Southern District of Florida, as taken on the date and time previously stated in the above matter.

I certify that the foregoing pages represent a true and correct transcript of the above-styled proceedings as reported on the date, time, and location listed.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was reported, and further that I am not financially nor otherwise interested in the outcome of the above-entitled matter.

/s/Quanincia S. Hill, RPR
Quanincia S. Hill, RPR, CRR
Official Court Reporter
Southern District of Florida

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